Tentative Rulings for December 17, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

09CECG04725 ***Jones v. Nuttall & Assoc.*** **(Dept. 501)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

11CECG02269 ***Diaz v. Nicolls*** **is continued to Wednesday, January 8, 2014 at 3:30 p.m. in Dept. 501.**

12CECG00438 ***Cruz v. H&H Agency, Inc.*** **is continued to Wednesday, January 15, 2014 at 3:30 p.m. in Dept. 502.**

13CECG02491 ***Von Welrhof v. Torrence*** **is continued to Wednesday, December 18, 2013, at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(6)

Tentative Ruling

Re: ***Phillips v. Amcord, Inc.***
Superior Court Case No.: 12CECG04055

Hearing Date: December 17, 2013 (**Dept. 402**)

Motions: (1) By Defendant Caterpillar Incorporated for summary adjudication;

(2) By Defendant Goulds Pumps, Inc., for summary judgment or, in the alternative, summary adjudication

Tentative Ruling:

The Court intends to continue all pending motions for summary judgment and/or summary adjudication to March 6, 2014, at 3:30 p.m., at 1:45 p.m., in Dept. 402. Tentative rulings on all pending motions for summary judgment being continued will issue normally on March 5, 2014. Oral argument on the motion of Pneumo Abex, LLC, currently set for Thursday, December 19, 2013, will go forward. Trial will be continued to April 14, 2014, and trial readiness to April 11, 2014.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/16/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(19) **Tentative Ruling**

Re: ***Mora v. Ballantine Produce Co.***
Superior Court Case No. 10CECG03791

Hearing Date: December 17, 2013 (Department 501)

Motion: By Pelton defendants for Summary Judgment, or in the alternative, for Summary Adjudication

Tentative Ruling:

To deny summary judgment and to deny summary adjudication.

Explanation:

1. Evidentiary Issues and Disputed Facts

The Court sustains moving parties' first objection to the declaration of Mr. Acosta and overrules the second objection. The Court finds that the following facts are admitted or ineffectively disputed: Moving parties' Facts Nos. 1, 2, 3, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 24, 25, 26, 27, 30, 34, 39, 40, 41, 42, 43, 44, and 45. Facts which are directly disputed or susceptible to a different inference are 5, 6, 8, 9, 20, 21, 22, 23, 28, 29, 31, 32, 33, 35, 36, 37, and 38.

Facts Nos. 5 and 6 - disputing evidence is found at the Mora Deposition, 34:20-23, 38:19-39:4, 40:22 – 41:2, 44:1-3, 45:11-24, 48:22-24, 57:24 -58:15 (all Ex. A to Salazar Decl.), and paragraphs 11-12 of Mora's declaration. Facts Nos. 8 and 9 are not established by the unsworn email cited as their evidentiary support.

Fact No. 20 discusses whether Mr. Pelton "authorized" his underlings to represent to Mora that he would be paid. The evidence presented raises a question of fact as to this, because Pelton knew that farm laborers were not being paid, and also that it was absolutely necessary that they be kept working or his plan to bring the business around would fail. Pelton was, according to some testimony, the one who decided which bills were paid, and Mora's was not among them. Yet Mora was assured several times, by Acosta and by the secretary at the main office, that his check was forthcoming. See Mora Declaration, paragraphs 8, 9, 10, 11, and 12; Acosta Declaration, paragraph 6, Mora Deposition (Ex. C to Salazar Decl.), 27:24 – 30:12, 34:20 – 35:4, 40:12 – 41:2; Pelton 4/22/2009 email to Bank of the West (attached to Exhibit B to Salazar Decl.); Pelton Deposition (Ex. D to Salazar Decl.), 46:7-17, 51:23 – 52:6, 53:21 – 54:2, 56:1 – 57:8, 58:2-21, 69:16-21, 74:11 – 76:9; DiBuduo Deposition (Ex. E to Salazar Declaration), at 34:14-24, 48:22 – 49:8; and the Pelton Declaration in the Bank of the West case, paragraph 34 (Ex. G to Salazar Declaration).

A jury could infer that Pelton knew full information had not been given to Mora, but wanted to keep him working anyway, and that Pelton was the one who decided not to pay him, while allowing his underlings continue to promise payment. The above also raises a dispute as to Moving Parties' Facts Nos. 21, 22, 23, 28, and 29, as

we see the corporate secretary repeatedly assuring Mora payment was on the way, and a promise by DiBuduo of payment when payment was questionable.

Facts Nos. 31 and 32 are disputed by Pelton Depo, 46:7-17, 51:23 – 52:6, Depo 53:21 – 54:2, 58:2-21, 74:11 – 76:9, and 79:3-12 (Ex. D to Salazar Decl.), and 4/22/2009 email attached to Exhibit B to the Salazar Declaration.

Fact No. 33 is that Pelton "anticipated" money to pay Mora would come from Bank of the West. The word "anticipated" is too strong, and implies an expectation rather than hope or speculation about a possibility. It is defined as "to realize beforehand," "to foresee," "to expect," "to be sure of," and other like phrases. The evidence provided does not establish an expectation, and Mr. Pelton's April 22, 2009 email to Bank of the West belies such an expectation (attached to Ex. B to Salazar Declaration.) See also the Vera Declaration, Churchill Declaration in Bank of the West Case (Ex. B to Salazar Decl.); DiBuduo Depo, 34:14-24, 48:22 – 49:8 (Ex. E to Salazar Depo), Pelton Depo, 33:8-36:4 (Ex. D to Salazar Decl.), and the conflicts between Pelton's declaration in this case and that in the Bank of the West case; plus the Albertson Declaration in Bank of the West Case (Ex. H to Salazar Decl.). This evidence also serves to dispute Fact No. 35.

Fact No. 36 is disputed by Pelton's declaration in the Bank of the West case, paragraphs 7 and 24 (Exhibit G to Salazar Decl.). Fact No. 37 is disputed by the Albertson Declaration in the Bank of the West case (Ex. H to Salazar Decl.). And Fact No. 38 is disputed by paragraph 8 of that same declaration.

2. Summary Adjudication is Not Available

The issues listed in the notice of motion are different than those listed in the separate statement, and the two issues listed for summary adjudication in the separate statement are each supported by but one fact, a reference to allegations only, which does not establish the issue raised.

No summary adjudication can be granted unless there was specific notice of the exact issue presented in the notice of motion. California Rules of Court, Rule 3.1350(b); *Maryland Casualty Co. v. Reeder* (1990) 221 Cal. App. 3d 961, 974, fnt. 4. 75 days' notice of such issue is required. *McMahon v. Superior Court* (2003) 106 Cal. App. 4th 112.

3. Statute of Limitations

Summary judgment must be denied on this ground if there are any causes of action against moving parties that were timely commenced. Without resolving the issue of whether or not the addition of the Pelton defendants can be characterized as substituting them in for Doe Defendants, the Court notes that the motion for leave to amend which resulted in the Pelton defendants being named was filed on April 17, 2012. Moving party argues that plaintiffs knew they would not be paid no later than May 1, 2009 (a factual issue not resolved here). If plaintiffs had filed an entirely separate case instead of seeking leave to amend, there is no question but that April 17 was less than three years before the date defendants urge discovery must have occurred.

Case law deems the date a motion for leave was filed as the date that an action was "commenced" for purposes of the statute of limitations. See *Wiener v. Superior Court* (1976) 58 Cal. App. 3d 525. "No good purpose is served by encouraging the filing of a separate action when an amendment to an existing action will suffice." (*Id*. at 530.)

> "A plaintiff has no control over the date when the trial court will act upon a motion for leave to amend. Even in a metropolitan court which hears motions every day, the court might, for reasons beyond the plaintiff's control, postpone the hearing beyond the date selected by plaintiff or take the motion under submission for later disposition. Thus, a plaintiff, seeking leave to amend an existing action to set forth a distinct but related claim, may not know within broad limits when the ruling will come down. If the date the motion is granted is to be the critical date, a careful lawyer must opt for the new-action-plus-consolidation procedure. From the viewpoint of what is a just and efficient system of procedure, it is difficult to condone a statute of limitations governed by the date on which a judge finds time to hear and decide a motion . . . The filing as a part of the notice of motion for leave to amend accomplishes the function of notice no less than the filing of a new complaint."
>
> (*Id*.)

See also 3 Witkin, California Procedure, "Actions," sec. 737 on page 961.

4. Pelton's Potential Culpability for Subordinate Representations/Concealments

The Court notes that there are significant differences in the testimony given by Pelton in this case and that gtven in *Bank of the West v. Ballantine*, Fresno Superior Court Case No. 09CECG01818.

For example, in this case, Pelton testifies that he had check signing power, reviewed all bills, and made the decisions on who was to be paid and who was not, with the knowledge that Ballantine lacked sufficient funds to pay all of its bills. In the Bank of the West case, however, Pelton filed a declaration expressly disavowing he could sign checks (paragraph 27 of Exhibit G to Salazar Decl.). Pelton also characterized the work being done by Mora's laborers as "critical" to Ballantine's survival. While Pelton was making the determination not to pay Mora, there is testimony that he told his immediate underlings to keep Mora working and that they falsely advised Mora that he would be paid, on several occasions. Mora only figured out he was not going to be paid after several trips to various Ballantine facilities, when he finally found an employee who told him the company had been closed.

"The duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts which are not accessible to the plaintiff." *Magpali v. Farmers Group* (1996) 48 Cal. App. 4th 471, 482. In *Stevens v. Superior Court* (1986) 180 Cal. App. 3d 605, the Court found that fraud was well-pled by alleging a hospital did not tell a patient it was using unlicensed foreign doctors and

one of them hurt her. Per *Stevens*, at 609: "Where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative misrepresentation is tenuous. Both are fraudulent. An active concealment has the same force and effect as a representation which is positive in its form." The Court there was quoting from *Outboard Marine. v. Sup. Court* (1975) 52 Cal. App. 3d 30, 37.

> "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him. A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it."
>
> *Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73.

The fact that Pelton will not admit to fraudulent intent is meaningless. "Human nature augers against any viable expectation of such admissions." *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal. App. 4th 755, 744. "[As] direct proof of fraudulent intent is often impossible, the intent may be established by reference from the acts of the party." *Delos v. Farmers Ins. Group, Inc.* (1979) 93 Cal. App. 3d 642, 658. "The conclusion of fraudulent intent is usually gathered from the circumstances." *Bank of California v. Virtue & Scheck* (1983) 140 Cal. App. 3d 1026, 1038. "[B]adges or indicia of fraud that might be insufficient when considered separately may, by their number and association when considered together, suffice as strong evidence of fraudulent intent." (*Id*.)

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *American Airlines v. Sheppard* (2002) 96 Cal. App. 4th 1017, 1049. "[T]he court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact." *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 856. See also *Alexander v. Codemasters Group Limited* (2002) 104 Cal. App. 4th 129, 139.

The totality of circumstances in this case could support an inference that Pelton permitted his staff to mislead Mora so as to ensure vital tree fruit thinning work was done in a timely fashion, as otherwise the income of the company would suffer substantially, thereby defeating Pelton's plans for it.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 12/16/13 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

03

Tentative Ruling

Re: ***Murillo v. ABM Industries, Inc.***
Case No. 11CECG04428

Hearing Date: December 17th, 2013 (Dept. 502)

Motion: Defendant Rodriguez's Motion for Summary Adjudication

Tentative Ruling:

To treat the motion for summary adjudication as a motion for judgment on the pleadings, and to grant the motion as to the fifth and sixth causes of action for failure to state facts sufficient to constitute a cause of action against defendant Rodriguez. (*American Airlines v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118; Code of Civ. Proc. § 438.)

To deny leave to amend as to the fifth cause of action. To grant leave to amend as to the sixth cause of action, if plaintiff can truthfully allege facts showing that Rodriguez aided and abetted another person in harassing plaintiff.

Plaintiff shall file and serve her second amended complaint within 10 days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

With regard to the fifth cause of action for retaliation, plaintiff cannot state a claim for retaliation against defendant Rodriguez because he is an individual employee of the corporation. Retaliation claims will only lie against the employer, not the individual supervisor or other employees. (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173.) Plaintiff's first amended complaint specifically alleges that Rodriguez was an employee and supervisor of the defendant corporation, and that he was acting in the course and scope of his employment when he committed the acts alleged in the complaint. (FAC, ¶ 11.) Therefore, plaintiff's retaliation claim against Rodriguez fails to state a valid cause of action against him as a matter of law.

Plaintiff concedes that she cannot prevail on fifth cause of action as to Rodriguez, but she claims that the motion is moot because she has agreed to "drop" the cause of action. However, plaintiff has not yet filed a dismissal of the cause of action, so the motion is not moot at this time, and the court intends to rule on its merits.

The court, however, intends to treat the motion for summary adjudication as a motion for judgment on the pleadings. Where a motion for summary judgment only challenges the validity of the complaint, it may be treated as a motion for judgment on the pleadings. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118.) Here, the motion for summary adjudication only seeks to challenge the legal validity of plaintiff's claim, rather than submitting any separate evidence showing that she cannot prove her claim. Therefore, the court will treat the motion as a motion for judgment on the pleadings rather than summary adjudication, and grant the motion.

Furthermore, the court intends to deny leave to amend, since there does not appear to be any way for plaintiff to cure the defect in her fifth cause of action as to Rodriguez.

Defendant also moves for summary adjudication of the sixth cause of action for aiding and abetting discrimination, harassment, or retaliation against plaintiff. Defendant contends that plaintiff cannot state a claim against him as an individual, because aiding and abetting claims will not lie against an individual employee of a corporation, since an employee of a corporation cannot aid and abet the corporation. (*Reno v. Baird* (1998) 18 Cal.4th 640, 655-656; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 79.)

In *Janken*, the Court of Appeal held that corporate employees cannot "aid and abet" the acts of the corporation in violation of Government Code section 12940(g). (*Janken, supra*, 46 Cal.App.4th at 77-79.) However, the court in *Janken* was only dealing with a discrimination claim, not a claim of harassment. (*Id*. at 79-80.) Thus, the court did not reach the issue of whether an individual supervisor could be held personally liable for aiding and abetting harassment by the corporation or another employee of the corporation.

Two years later, the California Supreme Court in *Reno v. Baird, supra*, 18 Cal.4th 640 approved *Janken's* holding and found that an individual supervisor could not be held personally liable under FEHA for aiding and abetting the corporation's alleged discrimination against the plaintiff. (*Id*. at 663.) However, the court also observed in a footnote that it was not deciding the issue of whether an individual supervisor could be held liable for harassment, as opposed to discrimination. (*Id*. at fn. 2.) The Supreme Court specifically cited to *Fiol v. Doelstedt* (1996) 50 Cal.App.4th 1318 in its footnote without expressing an opinion as to its holding. (*Ibid*.) Thus, *Fiol* remains good law.

In *Fiol*, the Court of Appeal held that a supervisor who aids and abets sexual harassment of an employee can be held personally liable. (*Id*. at 1331.) However, the court held that a supervisor cannot be held liable as an aider and abettor of the harasser simply for failing to take action to prevent the sexual harassment of a subordinate employee where the supervisor did nothing else wrongful. (*Id*. at 1326.) Nor can the supervisor be held liable as an aider or abettor of the corporate employer for merely failing to prevent harassment. (*Ibid*.) On the other hand, the court also held that the supervisor could be held liable for harassment if he or she personally participated in the harassment, or aided and abetted harassment by another through some conduct other than simply failing to prevent the harassment. (*Id*. at 1327-1328, 1331.)

In the present case, plaintiff has alleged that "DEFENDANTS, their agents, servants and/or employees, attempted to and did in fact aid, abet, incite, compel and/or coerce their agents, servants and/or employees to engage in unlawful sexual harassment, sex and/or gender discrimination, and retaliation against the PLAINTIFF." (FAC, ¶ 81.)

However, to the extent that plaintiff is alleging that Rodriguez aided or abetted the discriminatory or retaliatory conduct of the corporation or its employees, plaintiff's claim fails, because an individual employee or supervisor cannot be held liable for discrimination or retaliation. (*Janken, supra*, 46 Cal.App.4th at 77-79; *Jones v. Torrey*

Pines Partnership, supra, 42 Cal.4th at 1173.) Nor can plaintiff state a valid claim against Rodriguez based on his alleged aiding and abetting of harassment by the corporation. (*Fiol, supra*, 50 Cal.App.4th at 1331.) The only way that plaintiff can state an aiding and abetting claim against Rodriguez is if he aided and abetted another person who harassed plaintiff. (*Ibid*.)

While plaintiff has alleged that Rodriguez personally engaged in harassing conduct toward her (FAC ¶¶ 19-21, 34), she does not allege any facts showing that Rodriguez aided and abetted another person in harassing her. Rodriguez cannot have aided and abetted his own harassment of plaintiff, since "aiding and abetting" occurs when one person assists another person to commit a wrongful act. (*Janken, supra*, 46 Cal.App.4th at 77.) There are no facts alleged in the first amended complaint that would tend to show that Rodriguez ever aided or abetted someone else's harassment of plaintiff, and in fact it appears that Rodriguez was the sole harasser. (FAC, ¶¶ 19-21.) The conclusory allegation that "Defendants" aided and abetted their agents, servants and employees to engage in unlawful sexual harassment does not state any facts that would tend to show that Rodriguez did anything to aid or abet another person's harassment of plaintiff. Thus, the aiding and abetting claim fails to state a valid cause of action against Rodriguez.

Since the sixth cause of action fails to state a claim for aiding and abetting against Rodriguez, the court intends to treat the motion for summary adjudication as a motion for judgment on the pleadings, and grant the motion as to the sixth cause of action. The court also intends to grant plaintiff leave to amend, but only if she can truthfully allege facts showing that Rodriguez aided or abetted sexual harassment of her by someone other than himself.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 12-16-13.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Crow v. Gonzalez***
Fresno Superior Court Case No. 13CECG02998

Hearing Date: December 17, 2013 (Department 502)

Motion: by guardian ad litem for approval of minor's compromise.

Tentative Ruling:

To grant. Orders signed.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 12-16-13.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Huntley v. Burnett et al.***
Court Case No. 12CECG01508

Hearing Date: December 17, 2013 (Dept. 502)

Motion: Default Prove Up

Tentative Ruling:

To deny without prejudice.

Explanation:

On April 18, 2013, this court issued an order taking plaintiff's prior default prove up off calendar for various errors. All but one has been corrected.

Unfortunately, plaintiff has still not filed a Request for Entry of Court Judgment [Judicial Council Form CIV-100 with the appropriate box checked] and the court may not proceed without it.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 12-16-13.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(24) **Tentative Ruling**

Re: ***Beckerley v. ECO Integrated Development, Inc***
Court Case No. 13CECG00104

Hearing Date: **December 17, 2013 (Dept. 503)**

Motion: Default Prove-Up hearing

Tentative Ruling:

To deny without prejudice.

Explanation:

The judgment requested exceeds the amounts stated on the Statement of Damages served on defendant. Pursuant to CCP §580(a): "The relief granted to the plaintiff if there is no answer, cannot exceed that which he or she shall have demanded **in his or her complaint**, **in the statement required by Section 425.11 [personal injury or death actions], or in the statement provided for by Section 425.115 [punitive damage claims]** . . . ." (Emphasis added.) It is "fundamental to the concept of due process that a defendant be given notice of the existence of a lawsuit and notice of the *specific relief* which is sought in the complaint served on him." (*Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166 (emphasis added).). **Thus, in personal injury actions, the amount demanded in the Statement of Damages provides the "ceiling" for recovery.**

To the extent plaintiff seeks personal injury damages (*e.g.,* pain, suffering, and emotional distress) the ceiling for recovery for these damages is provided by her Statement of Damages ($1,000,000). And as for her "non-personal injury damages" (i.e., those related to her wages), the complaint itself *did not ask for a specific amount for these*. Thus, the only way defendant could have been informed of the large amount plaintiff was seeking in lost wages would be by including that amount on the Statement of Damage. Relief not demanded in the complaint, or otherwise demanded by service on Defendant, cannot be granted by default judgment, even though such relief would otherwise have been proper. "It is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he was given proper notice and an opportunity to defend." (*Marriage of Lippell, supra* at 1166, citing the U.S. Constitution, Art. XIV and *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 3130315.)

Furthermore, as discussed further below, even if plaintiff had put the amount sought for wages on her Statement of Damages, there is a problem with granting plaintiff <u>any</u> relief as to her wages, since it appears that all of her wages claims have been dealt with by her administrative actions.

Also, plaintiff's request for punitive damages cannot be granted. First, plaintiff did not properly serve a Statement of Damages on Defendant informing it of the amount of punitive damages sought, as required by Code of Civil Procedure Section 425.115. (See also Code Civ. Proc. §580, Subd. (a), quoted above.) She served a Statement of

Damages on defendant, but the blank for punitive damages merely stated "To Be Determined By A Jury." (See RJN, Ex. I.) This does not meet the requirements of due process. (*Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470, 1473.) Thus, no punitive damages can be awarded on default for this reason alone.

Furthermore, for punitive damages to be awarded on default, plaintiff must still present evidence of the defendant's financial condition, including evidence of the defendant's financial assets, and financial liabilities as well. (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680-681—punitive damages award reversed when plaintiff failed to present evidence of defendant's financial liabilities.) This burden cannot be waived by the defendant's failure to object to a plaintiff's inadequate showing, because of the public interest in meaningful judicial oversight of punitive damages awards. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1283.) Therefore, this requirement is present even in the context of a default judgment.

But beyond this, it is not clear that this court can award plaintiff anything for her wage claims, given the awards/judgments she has already obtained through her administrative actions. Both of these awards deal with plaintiff's *unpaid wages*. Both of the final awards accept as a fact that plaintiff's salary was to be $135,000 per year, with a guaranteed bonus of $50,000. However, a significant difference between the two awards is that the one issued by the Labor Commissioner awarded plaintiff front pay and requires her reinstatement to her former position, with the front pay to continue until defendant offered such reinstatement.

But it is not clear how these two awards are meant to "interact," or whether the later-issued award (the larger award) somehow supersedes the first. There clearly must be some interaction (coordination) or one superseding the other, in order to not provide plaintiff with a duplicate award for her one year of work, since both awards cover the period of April 1, 2010 to March 26, 2011. For instance, does the fact that there is no front pay and reinstatement ordered with the second award listed above (the one that was *issued first in time*) mean that the Superior Court ruling in Case #12CECG00016 *intentionally* did not grant front pay? Or does the fact that the Labor Commissioner's award was issued after that award mean that it takes precedence (at least as to that issue)? Or does the latter award completely supersede the earlier-issued award? If so, that would apparently mean that the specific costs items the Superior Court judgment ordered are rendered ineffective. Plaintiff does not address this issue at all.

But the main question is whether this court can give plaintiff *any relief at all as to her wage claims*, when these have clearly been addressed by the administrative ruling and the Superior Court's judgment on the Writ petition. Collateral estoppel applies to findings by an administrative agency acting in a judicial or quasi-judicial capacity. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867.) Such proceedings normally involve (and did involve here) "a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision." (*Id.* at pp. 867-868.)

Res Judicata would also appear to apply as to these awards/judgments, given that 1) these involve the same "claims" or "causes of action" plaintiff has presented in this case; 2) in both actions plaintiff obtained a final judgment on the merits (although as noted above, it is not clear *which one* is the effective judgment, or if both are somehow effective); and 3) it involved identical parties. "Claim preclusion, or merger and bar, is triggered when a judgment is entered. A valid and final judgment on a claim *precludes a second action on that claim or any part of it*. The preclusive effect is generally as to a subsequent action on the same claim or part thereof, not as to subsequent proceedings in the same litigation. The claim of a prevailing plaintiff is merged into the judgment." (*Holcombe v. Hosmer* (9th Cir. 2007) 477 F.3d 1094, 1098 (emphasis added).)

The point is this: if the plaintiff's wage claims have been merged into the judgment (or judgment and award) she has already obtained, can this court award anything further? Plaintiff has not addressed this issue. It appears that plaintiff seeks a judgment in this case that would represent an amalgam of her two prior awards plus a calculation of her front pay up to her retirement age. No authority is provided for this proposition. Furthermore, as noted above, defendant was not put on any notice that this would be the judgment sought in this action. Without showing any the authority for this, no judgment as to wages can be made in this action.

Furthermore, it is not at all clear that plaintiff's assumption about how long her award of front pay was intended to last is correct. The Labor Commissioner's award provided that lost wages "continue to accrue through the date an unconditional offer of reinstatement is made." Plaintiff *apparently* asks the court to assume that no offer of reinstatement has been made or will be made (she does not address this issue at all). She also appears to assume that this therefore entitles her to lost future wages (front pay) for the rest of her working life. There is no indication that this was the intent of the Labor Commissioner's award. Also, the relevant case law does not at all make it a foregone conclusion that the front pay, or even the reinstatement order, is to be effective for the rest of plaintiff's working life.

Front Pay is to compensate an employee for lost compensation during the period **between judgment and reinstatement** or in lieu of reinstatement. (*Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 U.S. 843, 850.) Reinstatement is the preferred remedy to compensate for future damages. (*Goldstein v. Manhattan Industries, Inc.* (11th Cir. 1985) 758 F.2d 1435, 1449.) However, this is often not feasible, especially where there is continuing hostility between plaintiff and the employer.

But the real question, any time front pay is sought, is the appropriate duration of it. The United States Supreme Court has cited cases from lower courts with approval which have found that the period of front pay was to be *temporary in nature*, intended to compensate plaintiff for training or relocating to another position. (See *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F.2d 1338, 1347—no abuse of discretion in awarding front pay *rather than* reinstatement; however "plaintiff's duty to mitigate must serve as a control on front pay damage awards" (citation omitted). As the court noted in *Anastasio v. Schering Corp.* (3d Cir. 1988) 838 F.2d 701, 709, "The purpose of front pay [there, under the ADEA] is … **not to guarantee** every claimant who cannot mitigate damages by finding comparable work **an annuity to age 70**." (Emphasis added.)

Clearly, plaintiff in this case has assumed exactly that—that she is owed front pay for life (i.e., for the duration of her working life).

Courts following the view that front pay awards are temporary uphold awards made for a reasonable period of time. (See *Dominic v. Consolidated Edison Co. of New York, Inc.* (2d Cir. 1987) 822 F.2d 1249, 1258—two years is reasonable time for a 48-year-old executive to find a comparable position; *Millsap v. National Funding Corp. of Cal.* (1943) 57 Cal.App.2d 772, 775—two years is a reasonable period of continued employment; *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 97—four years of front pay ordered.)

The court is aware of at least one case where the court upheld a lifetime award of front pay (i.e., an award for the remainder of plaintiff's working life) under FEHA, namely in *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 (*disapproved of on other grounds by Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644). However, the court in that case relied on *Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal.App.3d 695, 705, where the appellate court found that the contract in question was one terminable only for good cause, and the court's findings were supported by substantial evidence, including evidence showing that the court had considered plaintiff's age, physical condition and excellent employment record. No such substantial evidence is presented here. There simply is not enough presented here to find that an award of front pay for an additional 10 years is reasonable (again, assuming, *arguendo*, that this court were able to include any award for wages in its judgment, and assuming this court had the authority to interpret the Labor Commissioner's award to limit the amount of time front pay is to last).

And one final problem with the request for front pay going out an additional 10 years (again, assuming *arguendo* that this court were to make such an award), is that any such award **must be reduced to PRESENT VALUE**. (See, *e.g., Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F.2d 1338, 1347—issue of future lost earnings "and their reduction to present value" was a jury question needing "adequate inflation and discount rate evidence;" See also *Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 U.S. 843, 850—finding that front pay awards should be "equal to the estimated **present value** of lost earnings that are reasonably likely to occur between the date of judgment and *the time when the employee can assume his new position*" (emphasis added).) It is clear that the calculation is not just a matter of multiplying the number of months by the salary to come up with a figure, as plaintiff has done here. Instead, that figure then needs to be reduced to the *estimated present value*, with evidence ("adequate inflation and discount rate evidence") showing how that estimate was derived.

What Judgment is available on the evidence presented?

Based on the Statement of Damages, and excluding any request for damages based on wages (as explained above), plaintiff is left with the $1 million she requested for 1) pain, suffering and inconvenience ($500,000); and 2) emotional distress ($500,000).

Taking judicial notice of the awards plaintiff has received based on her complaints in other forums for retaliation and unpaid wages, plaintiff has been shown to have actual damages of over $500,000 (in the case of the award of the Labor Commissioner). "The amount of general damages awarded is usually correlated to the

special damages proved." (*Jones v. Interstate Recovery Serv.* (1984) 160 Cal. App. 3d 925, 928.) Thus, it is at least conceivable that this court might award plaintiff general damages for pain and suffering at the $500,000 she notified defendant she was seeking.

However, the emotional distress damages have not been sufficiently proved up by the papers presented, and more would be needed at the hearing. To recover damages for emotional distress, "the injuries suffered must be severe, i.e., substantial or enduring as distinguished from trivial or transitory." (*Commercial Cotton Co. v. United California Bank* (1985) 163 Cal.App.3d 511, 515 *disapproved of on other grounds by Roy Supply, Inc. v. Wells Fargo Bank* (1995) 39 Cal.App.4th 1051; see also *Gilchrist v. Jim Slemons Imports, Inc.* (9th Cir. 1986) 803 F.2d 1488, 1499—emotional distress award of $50,000 reversed based on insufficient evidence because distress plaintiff suffered was neither substantial nor enduring.) More would be needed to establish plaintiff's entitlement to emotional distress damages.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 12/16/2013.
(Judge's initials) (Date)